No. 15,045

In the

United States Court of Appeals

For the Ninth Circuit

LOUIS L. MAIDEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

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Appellant,

vs.

LOUIS L. MAIDEN,
Appellee.

Brief of Appellee United States of America

Appeal from the United States District Court for the Northern District of California Southern Division

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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I.

STATEMENT OF FACTS

The Findings of Fact of the Trial Court set forth the factual data upon which the Conclusions of Law and the

Judgment below are based. In summary, on December 22, 1952, Appellant signed written shipping articles as boatswain's mate aboard the SS LOMA VICTORY, a vessel of United States registry, owned and operated by Appellee United States of America. The SS LOMA VICTORY left San Francisco on or about January 2, 1953, on a voyage to Saigon, Indo China. The vessel, in addition to other cargo, carried a deckload of airplanes. The weather during the days after the vessel left San Francisco was extremely rough, necessitating inspections of the deck areas at least twice daily. Appellant was making an inspection of the SS LOMA VICTORY's deck cargo and gear at about 4:00 P.M. on January 9, 1953, and while he was inspecting the anchor windlass at the bow of the vessel, a heavy sea broke over the bow of the ship, striking Appellant and throwing him against the windlass, causing serious personal injuries.

On the basis of this accident Appellant filed suit against Appellee alleging the negligence of vessel personnel and the unseaworthiness of the vessel. In addition, there was a cause of action for maintenance payments allegedly due Appellant.

Upon conclusion of the trial below the Court, sitting in Admiralty, determined that there had been no negligence on the part of the vessel personnel nor had there been any unseaworthiness which was the proximate cause of Appellant's accident and that in fact Appellant had been negligent to a marked degree, which negligence was the proximate and controlling cause of his injuries, in that he proceeded out on deck in violation of orders, failed to notify the bridge of the vessel of his action and needlessly proceeded to a fully exposed position with his back to any possible oncoming sea. The Court further found that the wave which broke over the bow of the vessel at the time of the

accident was unexpected by anyone aboard the vessel. The Court further adjudged and decreed that maintenance payments be made by Appellee to Appellant for all past maintenance and in addition decreed future maintenance for a period of one year from and after August 3, 1955, in a lump sum, without prejudice to Appellant's rights to seek further maintenance as and when it became due.

Appellant has appealed from the judgment denying him general damages on the basis of alleged negligence and unseaworthiness, on the ground that the findings of the Trial Court were erroneous to the extent that a reversal of the judgment is indicated. Appellee United States of America also appealed the judgment on the ground that the Trial Court erred in holding that Appellant was entitled to recover past and future maintenance.

II.

APPELLEE ABANDONS ITS APPEAL FROM THE MAINTENANCE JUDGMENT.

Appellee United States of America hereby abandons and withdraws its appeal from the judgment of the Trial Court holding that maintenance was due Appellee in this case. Although the Trial Court found that Appellant was negligent himself to a marked degree, which was the proximate cause of his injuries, a review of the applicable case law indicates that on the basis of the evidence produced at the trial below, such negligence of the Appellant was not of sufficient gravity to defeat his claims for maintenance payments. Appellee therefore at this time abandons its appeal from the judgment below and urges that the entire judgment be affirmed by this Court.

III.

THERE WAS NO UNSEAWORTHINESS OF THE VESSEL WHICH PROXIMATELY CAUSED APPELLANT'S INJURIES.

Appellant contends that the cracking of cement which had been placed around the hawse pipes of the anchor chain on the forepeak of the SS LOMA VICTORY created an unseaworthy condition which caused Appellant to assume a hazardous position during stormy weather, thereby resulting in his accident. Upon the vessel's departure from San Francisco, the vessel's carpenter placed wooden blocks around the two anchor chains at the point where they passed through the hawse pipes leading from the forepeak of the vessel down into the anchor chain lockers below. This cementing was required in order to keep sea water from moving down the hawse pipes into the chain locker. From time to time during the succeeding days of the voyage, this cement cracked, which necessitated further cementing.

A. It Was Necessary to Inspect the Cement on the Forepeak Regardless of Whether or Not it Was Cracking.

Appellant contends that the cracking of the cement itself necessitated inspections on the forepeak of the vessel, even during heavy weather. The Court below on the basis of the evidence at the trial properly found that it was necessary to inspect the hawse pipe cement during heavy weather regardless of whether or not it was cracking or washed away. Appellant himself admitted in his direct testimony that he was injured while inspecting the cement rather than while repairing it (Tr. p. 136). The ship's carpenter, Anthony Surrell, testified that it was good seamanship to inspect the cement (Tr. p. 55). He also testified that he inspected the cement daily, including the day of the accident (Tr. pp. 66, 68). Captain Jack H. Healy, the only maritime expert who testified at the trial, stated as follows:

"Q. Captain, is it necessary to inspect the cement up in the hawsepipe from time to time while you are at sea, particularly during heavy weather?

A. Yes, a person should make sure that no water is going down into the chain locker.

Q. Is that true, Captain, whether that cement is breaking up, has broken up, or not? Are those inspections necessary, in your opinion, during heavy weather?

A. Yes.

Q. And as good seamanship on any ship in which you commanded, you would want that done on occasion even though you had no specific word that the cement was cracked or broken?

A. Yes, correct." (Tr. p. 539)

B. The Vessel Was Not at Fault Because of the Cementing Job.

Appellant's Brief urges that the cementing job performed aboard the vessel was unsatisfactory and thereby constituted an unseaworthy condition. Although, as the Trial Court correctly determined, the cementing of the hawse pipes was not the proximate cause of Appellant's injuries, the job was a good one, as was testified to by Chief Officer William L. Murray (Tr. p. 494) and by ship's carpenter Surrell (Tr. p. 53). The heavy seas encountered actually caused the cracking of the cement. The Libelant claims that defective plugs or wedges placed below caused the cement to crack. Captain Murray (Tr. p. 488) and carpenter Surrell (Tr. pp. 44, 45) both testified that it was normal practice to use wooden plugs or wedges below the concrete in order to hold it in place while drying.

C. It Would Not Be Proper to Lash the Anchor Chains Together.

Appellant also argues that the failure to lash the anchor chains together was also a causative factor in connection with the breaking of the cement. The testimony on this

point was quite clear. Captain Healy, as a maritime expert, testified that anchor chains had never been lashed together on any ship upon which he had served and that it would be a bad practice, in view of the tendency of the anchor chains to foul up if it became necessary to lower anchors under emergency conditions or upon arrival at port (Tr. p. 640). Ship's carpenter Surrell also testified that some mates on vessels on which he had served did not approve of the practice of tying anchor chains together (Tr. p. 23). He also testified that it might be dangerous to tie the anchor chains together (Tr. p. 61) and it might take more time to get the anchors down when necessary (Tr. p. 64). Appellant admitted that he had never discussed with anyone in authority aboard the vessel the possibility of tying the anchor chains together (Tr. p. 313) and Chief Officer Murray had also never discussed with any of the officers or other vessel personnel the possibility that the anchor chains might be tied together (Tr. p. 488).

D. No Catwalk or Lifeline Was Required or Even Advisable on the Forecastle Head.

Appellant's Brief urges that there should have been a lifeline or catwalk upon the forecastle head of the SS LOMA VICTORY, and its absence constituted vessel unseaworthiness. Appellant further argues that the accident might have been avoided if such lifelines or catwalks had been rigged on the forecastle head of the vessel. The evidence clearly shows that there had never been a catwalk or lifeline rigged on the forecastle head of the SS LOMA VICTORY during its voyage from San Francisco. Appellant further argues that certain catwalks on decks other than the forepeak deck were washed away and not replaced. However, the undisputed evidence showed that no catwalks or lifelines need be

rigged on the forecastle head of vessels such as the SS LOMA VICTORY. Appellant himself testified that there had been a line on the lower deck to the forecastle head but not on the forecastle head itself (Tr. p. 133). In accordance with the testimony of Second Officer Michael Mehallo, there never had been a need for catwalks even on the other decks of the vessel, in view of the fact that there was sufficient free area around the airplanes lashed to the deck to constitute a safe walkway and that catwalks are required only to provide passage over deckloads which take up the entire deck space (Tr. p. 443). Captain Healy testified that in his experience no lifelines or catwalks are required on the forecastle heads of vessels (Tr. p. 546). In fact, Appellant also testified on cross-examination that there was a solid railing approximately four feet high around the edge of the entire forepeak area along the sides of the ship (Tr. p. 172).

IV.

THERE WAS NO NEGLIGENCE OF THE VESSEL PERSONNEL WHICH PROXIMATELY CAUSED APPELLANT'S INJURIES.

Appellant in his brief argues that Appellee's personnel were negligent in a number of particulars, which proximately caused Appellant's injuries. A thorough review of the trial transcript and exhibits indicates quite clearly that there was no negligence of the vessel personnel in connection with Appellant's injuries. These various claims of negligence will be discussed below.

A. The Ship Was Proceeding at Reduced Speed and Just Making Headway.

All during the afternoon of January 9, 1953, and up until after the accident occurred, the evidence shows that the vessel was proceeding under reduced speed. The Deck

Log Book of the SS LOMA VICTORY (R's. Exh. B) shows that the engine speed was 50 R.P.M., or 50 revolutions per minute. Appellant himself in his testimony stated that the vessel was just making steerage way (Tr. p. 327) and was proceeding at reduced speed (Tr. p. 328). Mr. Alfred L. Manning, Jr., an ordinary seaman aboard the SS LOMA VICTORY, testified that the vessel was proceeding at reduced speed prior to Appellant's injury (Tr. p. 28). Chief Officer Murray also knew that the vessel was proceeding under reduced speed (Tr. p. 497).

This reduced speed was barely sufficient for the vessel to maintain headway or steerage way. Captain Healy testified that a vessel must maintain headway or otherwise it would wallow in the sea, with a considerable expectation of serious trouble (Tr. p. 542). Good seamanship dictated that the vessel should not be allowed to wallow.

B. The Wave Which Broke Over the Bow Was Unexpected.

The evidence reveals that the wave which struck Appellant was the first wave that had come over the bow during the period just prior to and during his inspection. The deck log of the vessel (R.'s Exh. B) indicates that seas had come over the bow at certain times during the period between noon and 4:00 P.M. on the day of Appellant's injury but that the force of the wind had been reducing during the afternoon. For example, the wind at 2:00 P.M. had a force of 8. The wind at 3:00 P.M. had a force of 7. The wind at 4:00 P.M. had reduced to 6-7 in force. This wind force tends to confirm the trial testimony that there were no seas coming over the bow just prior to 4:00 P.M. and up until the time Appellant was injured. Mr. Simeon Sarte, an able bodied seaman aboard the LOMA VICTORY, testified that while he went forward with Appellant during the course of the inspection, he noticed light sprays on the decks (Tr.

p. 100) but that the first wave coming over the decks was at the time the accident occurred (Tr. p. 109). Mr. Manning also testified that there were no green seas coming over the deck prior to the accident (Tr. p. 29). Appellant himself confirmed in his testimony that there had been no waves up on the deck of the vessel prior to the wave that struck him (Tr. p. 149). Second Officer Mehallo, who was on the bridge at the time of the accident, also testified that there were no seas coming over the decks of the vessel until the wave he observed at the time of Appellant's accident (Tr. pp. 397 and 398).

The above testimony shows that the sea which struck Appellant was not expected by anyone aboard the vessel.

C. The Vessel Was Not Speeded Up Prior to the Accident.

Appellant's Brief attempts to establish, at considerable length, that the vessel had been speeded up shortly before Appellant was injured. This attempt is based upon a great deal of conjecture, surmise and speculation on the part of Appellant's proctor. In order to attempt to show such a situation, Appellant's proctor has alleged a change in the time the heavy sea crashed over the bow of the vessel from 4:17 P.M. on January 9, 1953, to 4:21 P.M. on that day. Counsel has also been required to speculate regarding various reasons why the time of the accident was not in accordance with the testimony of the witnesses and also not in accordance with the vessel's log books. The most significant fact in this connection is that Second Officer Michael Mehallo, who was in charge on the bridge of the vessel during the 4:00 P.M. to 8:00 P.M. watch, testified without any possibility of doubt that he did not increase the speed of the SS LOMA VICTORY at any time during his watch up to and including the time that the heavy sea came over the bow and injured Appellant. On cross-examination, Mr. Me-

hallo was asked by Appellant's proctor direct questions as to whether he speeded up the vessel prior to the accident, as follows:

"Q. Mr. Mehallo, as a matter of fact, you speeded up the vessel to 55 revolutions immediately before this accident happened, didn't you?

A. No, sir, I never speeded the vessel up at no time when I took over the watch.

Q. Now, you are perfectly clear on that?

A. Perfectly clear." (Tr. p. 462)

The complete sequence of events as far as the movements of the vessel were concerned is fully set forth in the testimony of the various witnesses and in the log books and other documentary evidence produced at the trial. The vessel had been proceeding at 50 R.P.M. ever since 12:40 P.M. on the day of the accident, as indicated in the deck log of the vessel (R.'s Exh. B). This speed was maintained up until 4:17 P.M. or 1617, when the heavy sea came over the bow and struck Appellant. Second Officer Mehallo actually saw the wave come over the bow and fixed the time by looking at his watch, as shown in his testimony on cross-examination during the trial below, as follows:

"Q. Now, then, continuing this, you said, '1618 decreased speed to 50 r.p.m. Sent Mr. Russell, the third mate, to give assistance to the boatswain.'

I want to ask you this question, fairly and simply: Your position is that this accident happened, therefore, between 1617 and 1618, is that correct?

A. It happened at 1617, when I looked at my watch.

Q. Do you remember looking at your watch?

Q. I always do. It is a force of habit of mine from long-time experience that any incident happens on the bridge, as a mate, we have to log it. The instant anything happens whatsoever, I always have a habit of looking at my wrist watch. I have been doing that for 11 or 12 years.

Q. Then I take it that the reduction of speed down to 40 was to permit the ship to slow down and get a search party or a rescue party out, is that it?

A. That is correct." (Tr. p. 470)

Appellant's proctor made a number of efforts during the trial to establish other and different times for the accident, by quoting the Report of Personal Injury which stated that the accident occurred at 1620 (Tr. p. 459) and because of Mr. Mehallo's direct testimony before the log itself arrived for admission into evidence that the accident happened at approximately 1610 (Tr. p. 401). Mr. Mehallo testified at length that the log entry itself stated the exact time that the wave came over the bow and that the log entry was the most accurate time of the accident (Tr. pp. 445, 452 and 483).

Regardless of any specific time for the accident, it remains clear that neither Mr. Mehallo nor anyone else increased the speed of the vessel just prior to the accident. Chief Officer Murray testified that he did not speed the ship or order it speeded up (Tr. p. 496). Even the Appellant himself testified that he did not notice any change in speed up to and including the time of his accident (Tr. p. 328).

The further movements and speeds of the vessel after the accident form a logical and believable sequence of events that would normally follow the breaking of the wave over the bow of the SS LOMA VICTORY. The log shows that the wave struck at 1617. At 1618, one minute thereafter, the vessel's engine speed was reduced to 40 R.P.M. This was in accordance with the log book and also is shown in the testimony of Second Officer Mehallo, as follows:

"A. As I was just telling the third mate, 'Thanks for everything,' as he was going down, I happened to look out one of the portholes and a big freak wave came over and hit the bow and came all the way over the bow, and at that time I saw a dark object in the green sea,

and I thought something had broke loose forward. So the third mate was still by the passageway there, and I says to him, I says, 'Mister,'—well, I have forgotten the name now, anyway the third mate, I says to him, 'Oh, Mister,' I says, 'wait a while. There is something broke loose forward.' So when the green sea and the water came down the decks, I noticed the man struggling up on the anchor windlass trying to get loose and I knew it was a human body. Right away I told the third mate, 'You better take somebody and go up on the bow and give assistance.' In the meantime, I grabbed the telephone and slowed the vessel down and then I called the master. I didn't alter course; I didn't think it was necessary at the time because there were no more seas hit the bow." (Tr. pp. 398 and 399)

It developed that the vessel could not make steerage way at 40 R.P.M. during a test period of four minutes. It was then necessary at 1621 to increase the speed to 55 R.P.M. for steerage way, as shown in the log (R.'s Exh. B). At 1625 the vessel was able to reduce its engine speed to 30 R.P.M. on changed courses while the vessel's officers determined to request permission to divert the vessel immediately to Pearl Harbor, so that Libelant could obtain further medical care, as testified to by Chief Officer Murray (Tr. pp. 517 and 518) and in accordance with the vessel's log. Permission to divert was later granted by the Honolulu governmental authorities and the vessel proceeded as fast as possible to Pearl Harbor.

The only witness who even intimated that the vessel might have speeded up just prior to the accident was Mr. Simeon Sarte. The jarring of the vessel which Sarte noticed might well have been caused by the force of the tremendous wave that came over the bow, a natural force of wind and wave, not having anything to do with the revolutions per minute

of the vessel's engines. In any event, Mr. Sarte's belief is not supported by Appellant himself, by other witnesses or by the official records outlined in the vessel's deck log, as shown above. Furthermore, the Trial Judge in his determination of the case on the negligence issues in effect determined either that Mr. Sarte's testimony was not inconsistent with the substantial testimony that the vessel was not speeded up just prior to the accident or if His Honor did find an inconsistency, he determined that Mr. Sarte's testimony in that respect was not credible.

D. There Was No Notice to the Bridge That Appellant Was Going or Did Go Out on Deck.

Although it was customary and necessary to conduct certain inspections on the deck of the SS LOMA VICTORY even during heavy weather, the Chief Mate had ordered on the morning of the accident that no one was to go out on deck for general or ordinary work, as testified to by Appellant himself (Tr. p. 318). The evidence further shows that Chief Officer Murray had accompanied previous inspection parties when they went out on deck when the weather was particularly bad (Tr. p. 492). The Appellant himself testified that during the inspection on the morning of the accident, the Chief Mate had been in command of the party (Tr. p. 135). Chief Officer Murray confirmed that he accompanied the morning inspection party (Tr. p. 493).

During the afternoon, Chief Officer Murray met with the Appellant and made arrangements for both of them to go out to make the afternoon inspection at approximately 4:00 P.M. that day, as shown in the following testimony of Chief Officer Murray:

"Q. When were these inspections usually made?

A. Eight in the morning, sir, and 1600 in the afternoon.

Q. And who was present during the course of those inspections?

A. The boatswain and carpenter, Sergeant Myers was along, and myself, and sometimes an able seaman —pretty near always we had an able seaman with us.

Q. Would that be one of the seamen from that watch, sir?

A. That is correct, sir.

Q. And you were present at those inspections?

A. I never failed to be in those particular ones on account of the weather, sir.

Q. On account of the weather?

A. On account of the weather conditions. I didn't want a man to go where I didn't want to go." (Tr. pp. 492-493)

* * * * * * *

"Q. Captain, did you see Mr. Maiden, the boatswain, at any time during the afternoon of January 9 regarding anything about inspection?

A. Yes, I saw him.

Q. When and where and what—

A. I saw him in his room, and I saw him in the mess room, somewhere between the hours of 3:00 and 3:30.

Q. What did you say and what did he say?

A. To my recollection, it was we would go out at 4:00 o'clock or 1600, to make the regular inspection." (Tr. p. 494)

The Appellant confirmed that he and the Chief Officer arranged for the 4:00 P.M. inspection on the day of the injury. His testimony on direct examination was quite significant in this respect in that he started to say that the Chief Officer told him that "we" should make an inspection but later corrected that testimony to say that Appellant should make the inspection. This testimony of Appellant is stated below:

"A. I was in the crew's mess at the time, and Mr. Murray, the chief mate, came in there and I got up out of my chair and he said, 'Boatswain, I think we should make a—' He says, 'I want you to make an inspection tour before it gets dark'. He says, 'We are expecting bad weather.'" (Tr. p. 146)

After the Chief Mate left the Appellant, the Appellant, without going to his own quarters or checking with the Chief Mate proceeded with the afternoon inspection. Chief Officer Murray testified that Appellant had never done that before (Tr. p. 498). Appellant himself admitted that he at no time communicated with the officers and crew members on duty on the bridge of the vessel to advise them that he was going out on deck. The Appellant himself testified that he did not signal the bridge, look at the bridge or communicate with the bridge in any way prior to or during his inspection (Tr. pp. 330, 335). Chief Officer Murray did not know Appellant was out on deck or going out on deck alone (Tr. p. 531). Second Officer Mehallo, in charge on the bridge, knew of the orders that no one was to go out on deck without notification to the bridge (Tr. p. 391). He had no report concerning Appellant's trip out on the deck (Tr. p. 394).

E. Visual Inspection Did Not Reveal Appellant on the Deck.

Second Officer Mehallo testified that he made visual inspection from the bridge of the vessel which, unfortunately, did not reveal Appellant or those with him because of the limitations of vision (Tr. pp. 394, 395 and 396). Mr. Mehallo stated that men could be out on the decks of the vessel and be unobserved. The visual inspections revealed only spray on the decks of the vessel up until the time the sea came over the bow. The limitation of vision was caused by the vessel's masts and gear (Tr. p. 396), the deckload of air-

planes (Tr. p. 396), and the No. 1 masthouse, since a crewmember could not be observed from the bridge while standing just forward of the masthouse, as testified to by Mr. Sarte (Tr. p. 107), the Appellant himself (Tr. pp. 309 and 315) and Chief Officer Murray (Tr. p. 525). There was further testimony that a man could not be seen from the bridge while inspecting the anchor windlass from a position forward of the windlass, because of the height of the windlass up off the forepeak deck. This was testified to by Appellant himself (Tr. p. 333) and by Captain Healy (Tr. p. 594).

Appellant's Brief urges that extra lookouts or an inspection from the starboard wing of the bridge would have revealed Appellant at work. However, Chief Officer Murray testified that because of the weather conditions then being experienced by the vessel, visibility was better from inside the wheelhouse than from an exposed position out on the starboard wing of the bridge (Tr. p. 511).

F. The Proximate Cause of Appellant's Accident Was His Own Action.

The finding of the Trial Court that Appellant himself was negligent to a marked degree, which negligence was the proximate and controlling cause of his injuries, is well supported in the evidence, as discussed in the preceding sections of this Brief, in that Appellant proceeded out on deck in violation of orders, failed to notify the bridge of his action, and in addition proceeded to a point forward of the anchor windlass in a fully exposed condition with his back to any oncoming sea. Appellant could have inspected the anchor windlass from a safe position aft of the windlass, as testified to by Mr. Surrell (Tr. p. 80) and by Captain Healy (Tr. p. 546). If he had done so, the oncoming sea would have broken itself before reaching Appellant.

G. The Vessel's Personnel Were Not Negligent in Their Handling of the Vessel Even if They Had Known Appellant Was on the Forepeak.

Even if Appellant had notified the bridge that he was going out to inspect the decks of the vessel and the forepeak area and if he had been under constant observation from the bridge during all times that he might have been visible from the bridge and if thereafter the very same wave struck Appellant, there would have been no negligence of the vessel's personnel which proximately caused Appellant's injuries. As shown above, the testimony at the trial included the information that the vessel was operating at reduced speed, just making headway up to and including the time of the accident. The testimony further shows that no green seas had come over the decks of the vessel during and just prior to the inspection that afternoon. The sea which struck Appellant was unexpected by anyone aboard the vessel and on that basis was unavoidable as a practical matter. The wave itself was an Act of God, not brought about by any actions or inactions by the vessel personnel.

For these reasons, the Appellant has failed to make out a case of vessel liability for negligence even if all interested parties knew he was on the deck and in fact had observed him up until the time the wave came over the bow, which was not the case.

V.

THE FINDINGS OF THE TRIAL COURT SHOULD BE AFFIRMED UNLESS CLEARLY ERRONEOUS.

It is now well established that the Federal Appellate Courts accept as true the findings of Trial Courts in Admiralty actions unless the reviewing court finds them to be clearly erroneous. Furthermore, the Appellate Court is not now required to try an Admiralty appeal *de novo,* but will

apply Federal Rule of Civil Procedure 52(a), 28 U.S.C.A., page 13.

Earlier authority in Admiralty cases held that on appeal the matter could be tried anew by the Appellate Court. See 4 Benedict on Admiralty, Sixth Edition, Sections 571 and 572, and cases there cited. The United States Supreme Court in *McAllister v. United States* (1954), 348 U.S. 19, 75 S.C. 6, 99 L. Ed 20, firmly established that on appeal, an Admiralty judgment should not be set aside unless clearly erroneous. The Court in the *McAllister* case stated as follows at page 20:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under rule 52(a) of the Federal Rules of Civil Procedure."

This doctrine was affirmed in this circuit in *Amerocean Steamship Company, Inc. v. Copp* (CA 9-1957), 245 Fed. 2nd 291. In the *Copp* case, the court in ruling on the findings of the Trial Court stated as follows at page 293:

> "These findings must be accepted as true unless this Court finds them clearly erroneous. We are not required longer to try the matter de novo."

In the *City of Long Beach v. American President Lines* (CA 9-1955), 223 Fed. 2d 853, this Court also affirmed the doctrine that trial de novo was no longer available in Admiralty cases. The Court stated as follows at page 855:

> "The ghost of trial de novo in this intermediate appellate court has been laid at rest with finality in *McAllister v. U. S.*, 348 U.S. 19 * * *"

In *Benton v. United Towing Co.* (CA 9-1955), 224 Fed. 2d 558, Libelant claimed that his injury was caused by the

unseaworthiness of the Respondent's vessel and the negligence of the Respondent in failing to maintain the vessel's seaworthiness. The lower court held the barge was seaworthy and that there was no negligence of the Respondent. This court affirmed the decree of the District Court stating in part as follows at page 558:

> "Benton contends that this court should try this proceeding de novo and this although all the testimony was by witnesses heard by the trial court. Whatever may have been the rule heretofore, the contention that an admiralty appeal requires a trial de novo has been finally disposed of by the Supreme Court's holding in McAllister v. United States, * * *"

The rule that findings will not be disturbed is particularly applicable in a case in which all of the witnesses testified orally, as was true in the instant case. This court has held on a number of occasions that where all of the testimony is oral, a decree below will be affirmed if there is substantial evidence to support it.

> *Stockton Sand & Crushed Rock Co. v. Bundensen* (CCA 9-1945), 148 Fed. 2d 159;
>
> *Larsson v. Coastwise Line* (CA 9-1950), 181 Fed. 2d 6.

A careful review of the argument in Appellant's Brief relative to the findings indicates that there was only one insignificant error in the findings of the Trial Court. That error involved Finding No. 10, which states that the engine's speed was increased to 55 R.P.M. at 4:20 P.M. whereas the record indicates that this change occurred at 4:21 P.M. This difference of one minute has absolutely no effect upon the chain of events involved in Appellant's injury, since the record is clear that the accident occurred at 4:17 P.M., when the vessel's speed was 50 R.P.M., that the vessel's speed was

reduced to 40 R.P.M. at 4:18 P.M., that the vessel could not maintain steerage way and thereafter the vessel's speed was increased to 55 R.P.M., so that the vessel would not wallow. The fact that Finding No. 10 states that the increase of speed occurred at 4:20 P.M. rather than 4:21 P.M. is of no significance and should surely be within the de minimis rule, which is well established by applicable legal authorities and needs no citation here.

VI.

THE FINDINGS ARE FULLY SUPPORTED BY THE EVIDENCE.

The findings are fully supported by the evidence. Appellant's Brief (pp. 34 to 45) attempts to show that the findings are erroneous. Although, as shown above, the judgment below should be affirmed on the basis that the findings are not clearly erroneous, the fact is that the findings are fully supported in almost every respect by the evidence at the trial. Appellant's Brief as to the findings re-argues the alleged problems as to the cement used around the anchor chains, the failure to lash the anchor chains together and the absence of catwalks or lifelines. These observations in the brief are no doubt directed to the finding that no unseaworthiness of the vessel was the proximate cause of Appellant's injuries. However, the evidence below clearly showed that it was necessary to inspect the hawse pipes during heavy weather, whether or not the cement was known to have cracked under the stress of weather (Tr. p. 539). For this reason, the argument concerning the allegations of unseaworthiness of the vessel did not impress the Trial Court and, in fact, could not be the proximate cause of Appellant's injuries. It has already been shown that no catwalks are installed on a vessel's forepeak, so the arguments in Appellant's Brief regarding the presence or absence of catwalks or lifelines need not concern this Court.

The Trial Court's Finding No. 11 (Clerk's Trans. pp. 37 and 38) that Libelant proceeded to a point forward of the anchor windlass in a fully exposed position, with his back to any incoming sea, whereas he could have inspected the anchor windlass from a safe position aft of the windlass, is fully justified by the trial testimony as indicated in Section IV. F. of this brief. However, it is not necessary for an affirmance of this appeal to determine this alleged issue one way or the other. The ultimate fact is that there was no negligence or unseaworthiness attributable to Appellee which caused Appellant's injuries.

Appellant's Brief's further attack on Finding No. 11 to the effect that Appellant proceeded out on deck in violation of orders and failed to notify the bridge of his action, resolves itself into a mere play on words. The evidence shows that the Chief Officer planned to go out with Appellant and others at about 4:00 P.M., but that Appellant went out without the Chief Officer and in this respect violated orders. The uncontradicted evidence is that Appellant failed to notify the bridge of his action, which he took without advising the Chief Mate. Although the bridge knew that an inspection party was to proceed out on the deck, the bridge did not receive any specific advices when the party actually left, simply because Appellant went out on the bridge without advising the Chief Officer and contrary to orders. For that reason, the Bridge did not know that Appellant was out on the deck.

Libelant's Brief argues that Finding No. 8 is not justified. This finding states that visual inspections from the bridge did not reveal the Appellant on the decks of the vessel, because of limitations of vision. As shown in Section IV. E. of this brief, this finding is fully supported by the evidence, in that vision was partially obscured by the vessel's masts

and gear, the deckload of planes, the No. 1 masthouse, the anchor windlass itself and spray sweeping over the decks of the vessel.

Appellant's Brief also argues that Finding No. 9, which states that the wave which broke over the bow was unexpected, is error. The record is replete with support of this finding, in that the vessel was proceeding at reduced speed, and no waves had been coming over the bow during this period, as outlined in Section IV. B. of this brief above. The attempt by Appellant to change the time of the accident, in order to show that the vessel was speeded up prior thereto, is wholly negated by the sum total of the evidence as outlined in Section IV. C. of this brief above.

VII.

THE APPLICABLE AUTHORITIES CONFIRM THE CORRECTNESS OF THE JUDGMENT BELOW.

No court has yet held that a vessel owner becomes liable when an unexpected wave washes over the decks of the vessel, as long as the vessel is proceeding prudently and every normal precaution was taken to insure that an injury would not occur while crew members were out on the decks.

In *Gibbons v. United States* (DC Pa-1954), 124 Fed. Supp. 900, the master ordered Chief Mate Gibbons to go aft to see why the vessel was taking water into the steering room. The vessel was in a hurricane at the time. Gibbons and the boatswain proceeded on the main deck to the vessel's stern. At that time, the wind velocity was as high as 70 or 80 miles per hour and heavy seas from 12 to 25 feet high were coming over the stern about every 15 seconds. The boatswain attempted to tighten the leaky hatch cover involved and Gibbons inspected an oil drum attached to the rail. A few seconds later the next sea washed the deck. Both men jumped behind a ventilator. Gibbons was struck by the oil drum as it was hurled in the air, causing his

injuries. He later recovered, but subsequently died of a heart attack totally unrelated to this injury.

The Court held that Libelant had failed to make out a case of liability against the vessel either on the theory of negligence or unseaworthiness. As to negligence, the Court found that Gibbons could have observed the leaky condition by the use of an interior route through the ship's shaft alley. For that reason there was no negligent order for Gibbons to expose himself needlessly. In the instant case, Appellant was actually out on deck in violation of orders, both as to being accompanied by Chief Mate Murray and as to prior notification to the bridge. Also, Appellant could have inspected the anchor windlass from a position aft of it, thereby avoiding peril to which he voluntarily subjected himself by stepping out forward of the windlass with his back to any possible oncoming seas and in a position where he could not be seen from the bridge.

The Court in the *Gibbons* case also found that even if the position of the hatch cover was unseaworthy, it was not the cause of Gibbon's injuries. The Trial Court in the instant case also properly found that the cement in the hawse pipes had to be inspected whether broken or not. Under such circumstances, the cement's actual condition was immaterial as regards the inspection itself.

The cases which do find liability because of injuries resulting from heavy seas washing the decks of vessels involve factual situations wherein the vessel was proceeding at an excessive speed or in which the vessel was pitching and rolling heavily, resulting in heavy seas sweeping the decks prior to an accident. The cases of *United States v. Boykin* (CCA 5-1931), 49 Fed. 2d 762, and *Brett v. J. M. Carras, Inc.* (DC Pa-1952), 1952 AMC 1509, affirmed 203 Fed. 2d 451, are not applicable, since in the instant case the SS LOMA VICTORY was not proceeding at an excessive speed

nor were mountainous seas crashing over the decks of the vessel just prior to the accident.

In the instant case the vessel was proceeding at as slow a speed as possible at all times Appellant was inspecting the decks. In the *Boykin* case, the wind was blowing at 80 to 85 miles per hour and in the *Brett* case the vessel was pitching and rolling heavily, and heavy and mountainous seas coming from all directions were sweeping the forward decks of the vessel.

This Court should not reverse a well-considered judgment in favor of Appellee on the negligence and unseaworthiness issues when the evidence clearly shows that the vessel personnel took all conceivable precautions to protect the vessel crew members but one of them proceeded to a place of danger contrary to orders and without the knowledge of those in authority aboard the vessel.

VIII.

CONCLUSION

For all of the above reasons, Appellant United States of America hereby abandons its appeal from the maintenance judgment ordered below and urges that this Court affirm the entire judgment.

Dated, San Francisco, California, January 23, 1958.

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